IN THE

Supreme Court of the United States

OF AMERICA

In the matter of the petition of D. N. HOLDEN and LIZZIE HOLDEN for a Writ of Certiorari, directed to the Circuit Court of Appeals for the 9th Circuit, to bring before the Supreme Court the case of In re HOLDEN et ux.	No._____

NOTICE.

Sirs:—Please take notice that upon the annexed petition of D. N. Holden and Lizzie Holden, sworn to the 5th day of February, 1904, we shall move the motion here-

to annexed before the Supreme Court of the United States at the capitol in the City of Washington, District of Columbia, on Tuesday, the 23rd day of February, 1904, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Dated Seattle, February 5, 1904.

Yours, etc.,

P. P. CARROLL,

JOHN E. CARROLL,

Solicitors for Petitioners.

72 Hinckley Block, Seattle, Wash.

To James A. Stratton, Trustee, and Messrs. Bausman and Kelleher, his solicitors.

Copy of within notice and motion for writ of certiorari received this 11th day of February, 1904.

BAUSMAN & KELLEHER.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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MOTION FOR WRIT OF CERTIORARI.

And now come the petitioners above named, by P. P. Carroll and John E. Carroll, their solicitors, and move this Court, upon the annexed petition, sworn to the 5th day of February, 1904, for a Writ of Certiorari, directed to the Circuit Court of Appeals for the Ninth Circuit and to the District Court of the United States for the Northern Division of the State of Washington, to bring before this Honorable Court the case of In re Holden et ux, recently decided by the Circuit Court of Appeals of the United States for the Ninth Circuit, and by the District Court of the United States for the Northern Division of Washington, for such proceedings therein as to this Court may seem

just; and for such other and further relief in the premises as may be just.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

In the matter of the petition of D. N. HOLDEN and LIZZIE HOLDEN for a Writ of Certiorari, directed to the Circuit Court of Appeals for the 9th Circuit, to bring before the Supreme Court the case of In re HOLDEN et ux.

The petitioners respectfully show to this Court as follows:

Your petitioners were at the time of the commencement of this suit and are now citizens and residents of the State of Washington, and J. A. Stratton was and is the trustee in bankruptcy of D. N. Holden and Lizzie Holden, bankrupts.

In January, 1901, The First National Bank of Seattle, Washington, filed in the United States District Court, for the District of Washington, Northern Division, its peti-

tion setting forth that petitioner was a creditor of Daniel N. Holden and Lizzie Holden, his wife; that said Holdens were insolvent, and praying that they be adjudged to be bankrupts within the purview of the Acts of Congress relating to bankruptcy.

Said Holden and wife, in answer to said petition, admitted their insolvency and prayed to be adjudged bankrupts, and James A. Stratton, Esq., was duly elected and qualified as trustee in bankruptcy of their estate under the laws of the United States. Subsequently petitioners claimed among other property exempt under the state law certain policies of life insurance which had been delivered to the trustee. These policies were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wisconsin, and are numbered respectively 206,383, for $5,000.00; and 303,921 for $2,000.00. In both, Daniel N. Holden is the insured and Lizzie Holden, his wife, is named as the beneficiary. (The policies, according to the claim of the trustee, if allowed, have a present combined cash surrender value of about $2,200.00. That they have any cash surrender value, we deny. This is one of our contentions.)

The Referee in Bankruptcy, Hon. John P. Hoyt, ex-Chief Justice of the Supreme Court of the State of Washington, ruled on June 17th, 1901, that said policies were not exempt, but passed and were vested in the said trustee. But the referee in the certificate disallowing the exemption add, "In justification of said ruling, I desire to

state and certify that if this question had been in my opinion, an open one in this circuit, I should have held that said policies of insurance were, under the term of said Bankrupt Laws, exempt to the Bankrupts and did not pass to the trustees; but the Court of Appeals of this Circuit, having in the case of In re Scheld, 104 Fed. 870, passed upon this question and there being in my opinion no reason for distinguishing the case at bar from the above cited case, I feel bound to decide and certify as above stated. As Referee I do not feel that I would be justified in attempting to distinguish that case from this one, nor to make a ruling without regard thereto even although I am satisfied that the Court, in deciding said case improperly interpreted the bankrupt law of the United States."

On July 16th, 1901, the District Court, after an exhaustive presentation of the issue by counsel for petitioners and said trustee, entered an order setting aside the action of the Referee and directing that said policies be turned over to petitioners as exempt. Whereupon, said trustee applied to the United States Circuit Court of Appeals for the Ninth Circuit for a revision and review of the said order of the District Court to the end that the claim of exemption of petitioners be denied and the action of the lower court corrected.

On January 16th, 1902, the decree of the said Circuit Court of Appeals was filed, setting aside the said order of

the District Court and declaring said policies to be not exempt.

In re Holden, 51 C. C. A. 97; 114 Federal Reports 650.

The Court in said opinion closed with this paragraph:

"In Steele et al. v. Buel et al., 44 C. C. A. 287, the Circuit Court of Appeals of the Eighth Circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling in re Scheld. There is a way open to respondents for a further review of the questions involved."

On February 12th, 1902, and within 30 days of the entering of the decree by the Circuit Court of Appeals, these petitioners appealed to this Court. Said appeal was duly perfected and on November 16, 1903, on motion of said trustee, this Court dismissed their appeal, holding that appeals to this Court do not lie from the decisions of the Circuit Court of Appeals in the exercise of their powers of revision; but that certiorari does lie.

Holden vs. Stratton, 24 Supreme Court Reports 45.

On March 20, 1903, the following certificate of his Honor Justice McKenna was filed in this Court, to-wit:

"Whereas, the above-named appellants were duly

adjudged bankrupts in the United States district court for the district of Washington, northern division, on the 25th day of February, 1901; and

Whereas, appellants duly claimed two certain life-insurance policies as exempt to them under the acts of Congress relating to bankruptcy; and

Whereas, said claim of exemption was allowed by said district court; and

Whereas, on petition to review, the United States Circuit Court of Appeals for the ninth circuit disallowed said claim of exemption;

Whereas, it appears that the United States Circuit Court of Appeals for the eighth circuit allowed a similar claim of exemption;

Now, therefore, on motion of P. P. Carroll and John E. Carroll, solicitors for appellants, this is to certify that in my opinion the determination of the question, or questions, involved in the allowance or rejection of appellants' said claim of exemption to said life insurance policies is essential to a uniform construction of said bankruptcy act throughout the United States.

JOSEPH McKENNA,

Associate Justice of the Supreme Court of the U. S."

The Circuit Court of Appeals for the 9th Circuit, in re Scheld, 104 Federal Reports 870, held such policies to be not exempt, and as stated above, the Circuit Court of Appeals for the 8th Circuit in Steel v. Buel, 104 Fed. 968, declared that such policies were exempt.

In perfecting their said appeal your petitioners duly filed in this Court a transcript of the record from the

United States Circuit Court of Appeals for the 9th Circuit, and a brief, and said record and brief having been before this Court, your petitioners especially refer to the same and request the Court to take the same into consideration in passing upon the merits of this petition.

The questions and propositions of law involved in this case are:

Was it error to find and hold that the Life Insurance Policies issued to Daniel N. Holden on the 15th day of June, 1894, and numbered respectively 206,383 and 303,921, for the respective sums of $5,000.00, and $2,000.00, were not exempt under the Bankrupt Law?

Was it error to order that the decree of the District Court allowing said Bankrupts' claim of exemption, be set aside?

Was it error not to find and hold that the said Policies of Insurance and the proceeds thereof were exempt under the Bankrupt Act from all claims of the creditors of said Bankrupts?

The laws of Washington provide that the proceeds or avails of all life insurance shall be exempt from all liability for any debt.

Laws of Washington, 1897.

All of the liabilities of your petitioners were con-

tracted subsequent to September 1st, 1900.

By section 6 of the bankrupt law of 1898, it is provided that bankrupts shall have the exemptions which are *prescribed* by the state law of their domicile. Section 70 of the act provides, under a proviso, that when any bankrupt shall have any insurance policy which has a cash surrender value, the policy shall pass to the trustees as assets. Does the rule of exemption in Sec. 6 pervade the whole act; and if not, have the policies a cash surrender value?

In re Welling (C. C. A.) 113 Fed. 189.

Policy No. 206,383, for $5,000.00. The company by this contract agrees that, upon the payment of $233.80 on the 21st day of May in every year during the first ten years from May 21st, 1890, it will pay the said insurance to Lizzie Holden, wife of D. N. Holden, the insured, within sixty days after due proof of the fact and cause of the death of said insured. The premiums have all been paid. The policy contained the statement that it is issued on the Semi-Tontine Plan, and its Tontine Dividend Period is twenty years, and that the policy shall share in the surplus, according to company's usage, at each distribution after twenty years from May 21, 1890. There is endorsed upon the policy certain options which the insured may have upon the completion of the Tontine Dividend Period. The policy does not provide for any cash surrender value. Therefore, according to the Welling case, it does

not fall within the provisions of section 70 of the Bankrupt Act relating to a cash surrender value.

Another important question to be decided in this case is:

Has Congress the power to abrogate state exemption laws?

Whatever is not conferred in the Constitution is withheld and belongs to the several states, or to the people thereof.

Cooley's Principles of Constitutional Law, p. 29.

Any enactment of Congress which is opposed to the provisions of the Constitution, or is not within the grant of powers made by it, is unconstitutional.

Idem, p. 31.

Hence, as no such grant has been made to it, Congress has never claimed the right to abrogate state exemption laws.

In re Beckerford, 1 Dillon 45.

Nor is any such right properly an incident to an expressed power in the Constitution, and necessary to its execution.

But to give the exemption phase of the Bankrupt Act the construction contended for by the Trustees, and as

laid down by the Circuit Court of Appeals, would in effect be giving to Congress the unauthorized power to abrogate and annul state exemption laws.

Your petitioners have at all times promptly pursued in good faith the mode of procedure which to them seemed proper in the premises, and inasmuch as they had no precedent under the new law and practice they cannot be held to be negligent in the manner of bringing the matter before this Court.

In your opinion dismissing said appeal this Court held; referring to the bankrupt law:

"That under a reasonable construction of subdivision "d" of section 25, Certiorari lies to decrees in revision."

Subdivision "d," section 25, is as follows:

"Controversies may be certified to the Supreme Court of the United States from other courts of the United States and the former court may exercise jurisdiction thereof and issue writs of Certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

You seem to hold in your opinion in dismissing said appeal that section 25, "d," takes the place in the practice in bankruptcy of the usual practice of Certiorari from the Supreme Court, being 26 United States Statutes 828. You will observe that there is no limitation of time under

section 25, "d," as to when the application for Writ of Certiorari must be applied for.

Whether or not an application for Writ of Certiorari is timely must be left to depend upon the circumstances of each case. The fact that the mandate of the Circuit Court of Appeals has gone down does not preclude the Writ of Certiorari from the Supreme Court to review a decision of the Circuit Court of Appeals.

The Conqueror, 166 United States 110.
Bank v. Cooper, 20 Wall. 171.

Reasonable time in this case should be passed upon and begin to run from the time it was dismissed by the Supreme Court, inasmuch as your petitioners were making every effort to get the matter before your honors.

The greater the power of the Court the more liberal it should be in its holdings to meet out justice. Whether or not this writ is timely is entirely within the discretion of this Court.

Your petitioners further aver that the present case is one in which it is proper for this Court to issue a Writ of Certiorari for the following reasons, among others, because:

a. It involves questions of construction of such great magnitude and of unusual merit.

b. The decisions of the Circuit Court of Appeals

of the 8th and 9th Circuits are diametrically opposed to each other.

c. The questions of law involved herein have not been passed upon by this Court.

d. Public interests and the interests of jurisprudence require the decision of this Court on the questions of law involved herein.

D. N. HOLDEN,
LIZZIE HOLDEN,
Petitioners.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Petitioners.

United States of America, ss.
District of Washington.

D. N. HOLDEN and LIZZIE HOLDEN, being duly sworn, say and each for himself or herself says: I have read the foregoing petition. The same is true to my own knowledge, information and belief; my knowledge is de-

rived from the record in this case and from what has taken place in this matter in my presence and hearing.

D. N. HOLDEN,
LIZZIE HOLDEN.

Sworn to before me this 11th day of February, 1904.

(Seal.) P. P. CARROLL,
Notary Public in and for the State of Washington,
Residing at Seattle.

We hereby certify that we have examined the foregoing petition, and in our opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Petitioners.

Copy of within petition received this 11th day of February, 1904.

BAUSMAN & KELLEHER.